IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>FRANCISCO JAVIER QUINTANA,<br><br>Appellant. | ) | 2 CA-CR 2006-0345<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20041071

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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Terry Goddard, Arizona Attorney General
By Randall M. Howe and Carmen Dapkus, a student certified pursuant to Rule 38(d), Ariz. R. Sup. Ct., 17A A.R.S.

Phoenix
Attorneys for Appellee

Jacqueline Rohr

Tucson
Attorney for Appellant

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E S P I N O S A, Acting Presiding Judge.

**¶1** Appellant Francisco Quintana was convicted after a jury trial conducted in his absence of one count each of aggravated driving under the influence of an intoxicant (DUI) while his license was suspended or revoked or in violation of a restriction, a class four felony; aggravated driving with a blood alcohol concentration (BAC) of .08 or more while his license was suspended or revoked or in violation of a restriction, a class four felony; criminal damage of more than $2,000 but less than $10,000, a class five felony; and two counts of endangerment with a substantial risk of physical injury, class one misdemeanors. After he was apprehended in April 2006, the trial court imposed concurrent, presumptive sentences for each count, the longest of which was 2.5 years. On appeal, Quintana contends the trial court erred by denying his motion for a judgment of acquittal on all counts, made pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S., and by omitting particular language from a jury instruction. We affirm Quintana's convictions and sentences.

**Factual and Procedural Background**

**¶2** We view the facts and any reasonable inferences therefrom in the light most favorable to sustaining the convictions. *See State v. Henry*, 205 Ariz. 229, ¶ 2, 68 P.3d 455, 457 (App. 2003). In April 2003, David H. and his young son were driving past an apartment complex when Quintana pulled out of the parking lot into their path. H. was unable to stop, and his vehicle struck Quintana's truck.

**¶3** Pima County Deputy Sheriff Jessica Martin arrived at the scene almost immediately after the accident and "prior to the dispatch" about it. She contacted Quintana

and noticed his speech was distorted; his eyes were watery, red and bloodshot; and he had an odor of alcohol about him. Deputy Martin Walker, who also responded to the scene, noted Quintana's speech was "mumbled" and when Quintana spoke loudly, he slurred his words. Quintana told Martin he had not seen H.'s truck until the accident, and he had consumed "three or four 12-ounce cans" of beer in the two hours before the accident.

**¶4** Martin had Quintana perform field sobriety tests. She testified he had demonstrated cues of impairment on both tests he performed; two on the walk-and-turn test and one on the one-leg-stand test. Quintana also demonstrated other cues on both tests. Walker then arrested Quintana, who agreed to submit to a blood test and was taken to a hospital for a blood draw. The tests of his blood sample showed his BAC was .082.

**Rule 20 Motion**

**¶5** Quintana maintains the trial court wrongly denied his motion for judgment of acquittal because insufficient evidence supports his convictions. We review a trial court's ruling on a motion for judgment of acquittal for an abuse of discretion. *Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d at 458. Every conviction must be based on "substantial evidence," Rule 20(a), Ariz. R. Crim. P., that is, evidence "which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt," *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). If reasonable people can differ about whether the evidence establishes a fact in issue, that evidence is substantial. *State v. Atwood*, 171 Ariz. 576, 597, 832 P.2d 593, 614 (1992). We will reverse a conviction for insufficient evidence

"only if 'there is a complete absence of probative facts to support [the trier of fact's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

**¶6** Although Quintana minimally argued each of the five charges against him in his motion, on appeal, he challenges only the sufficiency of the BAC evidence. Because this evidence relates to only one charge, the count of aggravated driving with a BAC of .08 or more with a suspended or revoked license,[1] A.R.S. § 28-1381(A)(2), we limit our analysis to that count. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi), 17 A.R.S. (appellant's brief must include "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor"); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim."); *State v. McCall*, 139 Ariz. 147, 163-64, 677 P.2d 920, 936-37 (1983) (same).

**¶7** Quintana contends the evidence was "not clear" whether his BAC was less than .08 at the time he drove. He premises this argument on the criminalist's testimony that the Arizona Department of Public Safety (DPS) laboratory has "adopted an accuracy rate of plus or minus five percent," asserting his BAC at the time his blood sample was drawn was

[1]As noted above, the officers testified about Quintana's impairment which supports his conviction for aggravated driving under the influence of an intoxicant with a suspended or revoked license.

actually only .077, assuming his test results were, in fact, five percent higher than his actual BAC. Thus, he argues, the evidence was insufficient to support his conviction under § 28-1381(A)(2).

**¶8** This argument, however, somewhat mischaracterizes the evidence. Criminalist Seth Ruskin actually testified that, "[f]or duplicate sample analysis, samples have to be within five percent," explaining that meant "the results of that duplicate analysis have to be within five percent *of each other*," (emphasis added), and that he reports "the lower of the two values." Ruskin testified his analyses showed Quintana's BAC was .082 within two hours after the accident. Although, on cross-examination, Ruskin agreed that mathematically, .082 less five percent is .077, his testimony was sufficient to permit the jury to conclude Quintana's BAC had been .08 or more within two hours of driving, as the statute requires. *See* § 28-1381(A)(2). Accordingly, because the state presented substantial evidence of Quintana's guilt, the trial court did not err in denying his Rule 20 motion. *See Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d at 477; *Atwood*, 171 Ariz. at 597, 832 P.2d at 614.

**Jury Instruction**

**¶9** Quintana argues, with no citation to authority other than the standard of review, that a jury instruction was erroneous. Although Quintana again seeks to have all five convictions vacated, his argument relates only to the count of aggravated driving with a BAC of .08 or more with suspended or revoked license, so we address only that count. *See* Ariz.

R. Crim. P. 31.13(c)(1)(vi); *Carver*, 160 Ariz. at 175, 771 P.2d at 1390; *McCall*, 139 Ariz. at 163-64, 677 P.2d at 936-37.

**¶10** The essence of Quintana's argument is that language in § 13-1381(A)(2) did not appear in the instruction.[2] However, he failed to object to the instruction at trial; therefore, this argument has been waived absent fundamental error. *See* Ariz. R. Crim. P. 21.3(c), 17 A.R.S.; *State v. Valenzuela*, 194 Ariz. 404, ¶ 2, 984 P.2d 12, 13 (1999) (failure to object to any error or omission in jury instruction is waived on appeal unless it is fundamental error). Fundamental error is that which deprives the defendant of a right essential to the defense or to a fair trial or error that goes to the foundation of the defendant's theory of the case. *State v. Siddle*, 202 Ariz. 512, ¶ 4, 47 P.3d 1150, 1153 (App. 2002). Quintana bears the burden of persuasion and "must establish both that fundamental error exists and that the error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). "Generally, the failure to give an instruction [that] has not been requested is not error." *State v. Evans*, 109 Ariz. 491, 493, 512 P.2d 1225, 1227 (1973).

**¶11** The challenged instruction did not include the statutory language, "the [BAC must] result[] from alcohol consumed either before or while driving or being in actual physical control of the vehicle." § 28-1381(A)(2). The evidence, however, showed Quintana

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[2]Quintana argues A.R.S. § 28-1382(A) contains the same omitted language, but he was neither charged nor convicted under that statute.

had admitted to officers at the accident scene that he had consumed several beers a short time before the accident and Quintana has failed to explain how the alleged error prejudiced him. He has thus failed to demonstrate any fundamental error resulting from the giving of the instruction, *see Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607, and we see none. *See Evans*, 109 Ariz. at 493, 512 P.2d at 1227.

**Disposition**

**¶12** Quintana's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Acting Presiding Judge

CONCURRING:

GARYE L. VÁSQUEZ, Judge

J. WILLIAM BRAMMER, JR., Judge